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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 453

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WABASH RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ILLINOIS TERMINAL RAILROAD COMPANY, AND A. E. STALEY MANUFACTURING COMPANY*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 134–139) is reported in 51 F. Supp. 141.

The general report of the Commission appears in 209 I. C. C. 11. The two pertinent supplemental reports appear in 215 I. C. C. 656 and 245 I. C. C. 383 (R. 17–43).

*Staley was permitted to intervene in the court below (R. 8485).

JURISDICTION

The final decree of the district court was entered on July 14, 1943 (R. 143–144). Petition for appeal was filed August 26, 1943 (R. 150), and the appeal was allowed the same day (R. 153). Probable jurisdiction was noted on November 22, 1943 (R. 891). The jurisdiction of this Court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 219, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345).

STATUTE INVOLVED

The pertinent provisions of Part I of the Interstate Commerce Act are set forth in Appendix I, *infra*, pp. 83–91.

QUESTIONS PRESENTED

The ultimate question is as to the validity of an order of the Interstate Commerce Commission that appellee railroads must cancel their tariff supplements by which the carriers proposed the elimination of charges for spotting[1] performed at an industrial plant. The Commission had concluded that transportation under appellees' line-haul rates ended with delivery of the cars on the interchange tracks and that performance of the spotting without additional charge would violate Sec-

[1] "Spotting" means the placing of freight cars at the doors of factories, or on the spot where they are needed (R. 44).

tion 6 (7) of Part I of the Interstate Commerce Act.

Subordinate questions are:

1. Whether the Commission's order was authorized by the Interstate Commerce Act.

2. Whether the district court erred in holding that the Commission's findings and order were unsupported by substantial evidence, and in basing its decision thereon upon a partial record.

3. Whether the district court could decide questions of fact, including questions of discrimination and preference, or could substitute its judgment for that of the Commission on administrative questions, where such questions were not decided by the Commission.

4. Whether the Commission's order was unreasonable or arbitrary.

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the Southern District of Illinois, sitting as a specially constituted three-judge court, Circuit Judge Evans dissenting, permanently enjoining and setting aside an order of the Commission entered in *A. E. Staley Manufacturing Company Terminal Allowance*, 245 I. C. C. 383.

Appellees are three of five rail carriers operating to and from the City of Decatur, Illinois, all of which provide a line-haul service to the industrial

plant of the Staley Company located in the shipping district of that city (R. 20–21).

The order in question was entered on further hearing of issues included in the report of the Commission appearing in 215 I. C. C. 656, under the same title and which was the fifty-fifth supplemental report issued by the Commission following its main report, 209 I. C. C. 11, in *Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services* (hereinafter called *Ex Parte 104*), a proceeding instituted by the Commission in 1931 for purposes generally indicated by its title. Part II thereof related to the practices of the carriers in respect of the spotting of cars at the sites of industries served by them. Since numerous of the Commission's supplemental reports issued in *Ex Parte 104* have been before this Court,[2] it is unnecessary to describe the proceedings further than to say that, while they covered the service of spotting in its various forms, including its customary form of direct spotting of cars on ship-

[2] The reports and orders have been in all cases sustained as valid. *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, unreported opinion (E. D. Wis.), and *A. O. Smith Corp.* v. *United States*, unreported opinion (E. D. Wis.), both affirmed *per curiam*, 301 U. S. 669; see also *Inland Steel Co.* v. *United States* and *Chicago By-Product Coke Co.* v. *United States*, 306 U. S. 153.

pers' side tracks and spurs,[3] nevertheless, the investigation was chiefly concerned with the carriers' practices in the matter of performing, or assuming the obligation to perform, spotting at the larger industrial plants having complicated track lay-outs and many needs for such track in addition to the spotting work; that the service of spotting includes both the placement of in-bound cars at unloading points and the taking of out-bound cars from loading points, within the plant property; and that, at the larger plants the performing of such service, whether in-bound or out-bound, generally involves an additional placement of the cars on the interchange or "hold" tracks, and frequently further intermediate placements as well.

Also of general importance to this case are the facts, appearing in the Commission's main report, that the investigation showed that in most sections of the country (and subject to the qualification that there was no real uniformity of carrier practice in the matter)[4] it was the practice of the carriers, in serving the large industrial plants equipped with plant railways, not only to perform without charge the spotting themselves

[3] *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 409, 410.

[4] The practice of performing spotting without charge (or, more usually, paying an allowance) is more nearly uniform in the case of iron and steel plants. *United States* v. *American Sheet & Tin Plate Co.*, 310 U. S. at 410. In fact, it appears that it was attempted to confine the practice to such plants even quite recently. 209 I. C. C. 11, Appendix, p. 47.

when that was desired, but also and much more frequently to pay to the industries in lieu thereof allowances for performing the spotting with their own locomotives; that this latter practice had started in the eastern industrial regions where the industries frequently found it more desirable to perform the spotting with their own engines rather than to accord access to their plants to railroad locomotives, and where the carriers also found, at least to the extent that spotting at the plants was their obligation, that it was generally cheaper for them to pay allowances than to assign locomotives to the plants for such work; that shortly after the first world war such practice by the carriers of paying spotting allowances to industrial plants equipped with plant railways increased extensively in the regions where it was initiated and thereafter spread rapidly and extensively to other regions and sections of the country until at the time the first reports in the investigation were written the only sections not reached were New England, the Southeast and the extreme Southwest (209 I. C. C. 11, 33, 34); that in the latter sections of the country, however, the carriers altogether refused to pay spotting allowances, the New England carriers taking the position that such allowances were improper and the Southern carriers taking much the same position but predicated apparently on the view that spotting allowances in lieu of the work being done by railroad locomotives would only be desired by

an industry after it had reached such growth and consequent frequent need for spotting service as would at the same time terminate their obligation to perform the actual spotting (209 I. C. C. 11, 34).

While the Commission, in so referring in its main report to the position taken by the New England and Southern carriers, showed strong general approval of their views, this, it makes plain, is not meant to indicate that it considered the different practice in other parts of the country as unlawful except where the carriers, by undertaking to pay spotting allowances to such plants, may have assumed to perform or pay for a service in excess of their line-haul obligation. With reference to the question as to the carriers' obligation to spot cars within the yards and over the tracks of large industrial plants, the report emphasizes the necessity for recognizing that a line of demarcation exists between the services included in the transportation and those included in the industrial operations, and it states that the position and testimony of the Southern carriers "shows that this line should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plan" (209 I. C. C. at p. 34).

Once it is realized that so far as large industrial plants are concerned,[5] there is a point beyond which the railroads' obligation to render services does not extend (*i. e.*, a point where "transportation" (sec. 1 (3) (a)) ends, the reason for the Commission's recital of the rapid extension and spread of the practice of paying spotting allowances to such plants is apparent. While to the extent that the carriers were under *obligation* to perform the spotting, they were doubtless fully entitled to pay the allowances instead of doing the work with their own locomotives, nevertheless, as shown in the report's discussion of allowances (see particularly 209 I. C. C. 11, 27), where it is a matter simply of paying allowances, the question of a common carrier's obligation to perform spotting under the conditions existing at particular plants is a consideration much more remote than when the carriers are undertaking the actual work. Accordingly, the rapid extension and spreading of the practice of granting spotting allowances to industrial plants equipped with plant railways

[5] It should be kept in mind that the very fact that the allowances paid to the industries were for spotting cars presupposes that they were equipped with plant railways, and that this factor while still leaving much room for investigation, nevertheless, itself, distinguishes such spotting from the spotting by the carriers of cars on sidetracks and spurs. *Los Angeles Switching Case*, 234 U. S. 294, 307, 310; *Chicago & Alton Ry. v. United States*, 156 Fed. 558, 562, affirmed, 212 U. S. 563; *N. Y. Central & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, certiorari denied, 243 U. S. 636.

(plants of the kind where the spotting of cars as an obligation of the railroads is always at best a matter of doubt), furnished considerable ground for the belief that the allowances being paid to those industries were in many instances beyond any obligation of the railroads as common carriers under their line-haul rates. And in the investigation undertaken by the Commission in 1931, which included proceedings with respect to numerous individual plants, it proved to be the case that a large proportion of the allowances being paid the plants were mere gratuities, or unlawful refunds from the rates, for the reason, as found by the Commission, that under the conditions attending the spotting of cars at the plants involved, the spotting was not a carrier obligation included in the railroads' line-haul rates but was "plant service" and, therefore, was work properly done by the industries for themselves and not entitling them to allowances out of the rates.

As explained in the main report (209 I. C. C. 11, 17),[6] under railroad tariff practice in this country, the rates on carload traffic named to or from any city or town, apply to a so-called "switching [or terminal] district" and entitle the industries within such district to have their traffic delivered directly to and taken from the

[6] See also *N. Y. Central & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, certiorari denied, 243 U. S. 636.

site of the industry. By this method of delivery and employment of private tracks, the railroads are saved the expense of acquiring and maintaining larger terminals, and it has accordingly been considered that such deliveries were no more than the equivalent of the "team track"[7] delivery accorded to shippers generally under the line-haul rates.[8] And, so far as concerns those industries whose requirements are met by deliveries on spurs and side tracks, it is doubtless true that the service to which they are entitled under the line-haul rates contemplates the spotting of the cars at points convenient for unloading and loading. But in cases of the larger industries with their plant railways, the problem of what constitutes delivery

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[7] Team tracks are ordinary sidings at way stations or in the railroads' yards for unloading and loading freight cars.

[8] In its order involved in the *Los Angeles Switching Case*, 234 U. S. 294, the Commission confirmed what had, with few exceptions, been the railroads' practice throughout the country, namely, according direct deliveries to the industries under the line-haul rate, that is, without extra charge. The Court, in sustaining the Commission, refers to such delivery as a substitute for that included in the rate (*e. g.*, "team track" delivery) and not used (p. 308). Thus, it is apparent that the Court is referring to the fact that the cars are not first taken to team tracks, spurs, etc., but are segregated at break-up yards and then taken directly to the industrial plants. The Court also confirmed the Commission's finding that the deliveries involve no greater expense than team-track delivery (p. 308). The opinion distinguished such deliveries on side tracks and spurs from deliveries such as here, *i. e.*, over "interior switching tracks constructed as plant facilities" (pp. 310, 307).

is obviously different, which fact has been recognized by the courts and the Commission from the early days of regulation. In its general investigation involved here, the Commission found that cars brought by the railroads to such industries practically always come to rest on interchange or "hold" tracks, and the question as to whether the service beyond, namely, the spotting of cars at unloading and loading points, is required or contemplated to complete delivery under the line-haul rates was the question posed by the Commission in its main report (209 I. C. C. 11) and dealt with in its supplemental reports respecting the individual industries investigated.

Generally typical of the Commission's conclusions in supplemental reports where it concluded that the spotting of cars at a plant was not a railroad obligation included in the line-haul rates, are its ultimate findings in its supplemental report in *Allegheny Steel Co. Terminal Allowance,* 209 I. C. C. 273, 276,[9] They read:

> We find that the existing line-haul rates of the Pennsylvania Railroad must be construed as framed to cover the delivery and receipt of shipments at a reasonably convenient point; that the interchange tracks described of record constitute such a reasonable point; that the transportation services which it is the duty of the carrier to perform for the steel company begin and

[9] This was one of the reports involved in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

> end at the interchange tracks; and that the switching movements by the steel company between such interchange tracks and points within its plant are plant services which it is not the duty of the respondent carrier to perform under its line-haul rates.
>
> We further find that by the payment of an allowance for the service performed on interstate shipments beyond the interchange tracks described of record, the respondent carrier provides a means by which the industry enjoys a preferential service not accorded to shippers generally, and refunds or remits a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6 (7) of the act.

The violation of section 6 (7) declared by the above necessarily followed from the Commission's administrative conclusion that transportation under the line-haul rates ended on the interchange tracks. With that conclusion reached, it followed that there had been a "departure from * * * rates of the published tariffs" (*Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 511)" which, whether a departure in the form of a money rebate or in the form of special service not included under the rate, constitutes action forbidden by, and violative of, Section 6 (7) of the Act. In the above case (involving a spotting allowance), it followed from the Commission's conclusion that transportation ended on the interchange tracks that the purported allowance

made to the shipper was a forbidden refund, or rebate, from the published rate in violation of section 6 (7) of the Act. The result, however, of the giving of such rebate, particularly in the form of a purported spotting allowance, was, as stated by the report (209 I. C. C. at p. 276), to provide the means whereby the favored shipper enjoyed a preferential service not accorded to shippers generally under the rates.

As distinguished from the supplemental reports, such as the *Allegheny Steel* one, *supra*, the Commission's main report (209 I. C. C. 11) was not accompanied by an order. The report, however, announced the general principles as to operating circumstances and conditions within a plant to be applied in determining whether reasonable delivery, or receipt, of cars under the line-haul rate covers spotting service within the plant. The standard laid down is what has long been termed the "equivalent of team track, or simple switching delivery," but it should be noted that the Commission defines or specifies service that is to be regarded as in excess thereof. The text of this part of the report is as follows (209 I. C. C. at pp. 44–45):

> When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in

> which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. * * *

Included among the supplemental reports issued by the Commission following its main report was the report in *A. E. Staley Mfg. Co. Terminal Allowance,* 215 I. C. C. 656, this being the original report involved in the present case. It is there shown that the Staley Company, located at Decatur, Illinois, dealt extensively in grain of various kinds and manufactured grain products principally from corn; that the western section of its plant was composed of about 40 buildings, used for manufacturing and refining, and two large elevators; that these buildings and elevators were served by numerous tracks and spurs extending throughout that portion the plant, which converged and extended eastward for a distance of about 0.75 of a mile, making connection there with a large yard (known as the Burwell yard) containing about 15 tracks; that contiguous to this yard there was another group of buildings and large elevator; that the plant trackage including that in the yard aggregated about 20 miles; and that at the time of the hearing the Staley Company was receiving about 3,000 loaded cars monthly, consist-

ing mostly of grain, and was shipping monthly about 1,000 cars of manufactured products.

The report (215 I. C. C. 656) further shows that the Staley plant was served by five railroads (the Wabash, the Baltimore and Ohio, the Pennsylvania, the Illinois Central, and the Illinois Terminal Company); that all of the railroads used the Burwell yard tracks for interchange except the B. & O., which interchanged traffic near the main or western section of the plant; that the Pennsylvania, Illinois Central, and Illinois Terminal reached the plant and interchange tracks in part over a joint track built by those roads in 1930 and in part over track of the Staley Company built to connect therewith; that of the latter three railroads only the Illinois Central operated over such track, handling the cars of the others along with its own; and that the in-bound cars of all the railroads were placed on interchange tracks and the out-bound cars taken from interchange tracks, the spotting of the cars between such tracks and unloading and loading points within the plant being done by locomotives of the Staley Company and the latter being paid a per-car allowance by the railroads.

Prior to 1922 and when the Staley plant was served by two railroads only, the railroads performed the spotting with railroad locomotives but, because of the confusion created, this practice was abandoned in favor of the practice whereby the

Staley Company performed the spotting and received an allowance (215 I. C. C. 656, 657). Subsequently, the plant was further enlarged and its track extended to secure the service of the three other railroads.

In this first *Staley* report, the Commission stated that the record showed conclusively that the spotting by the two railroads was discontinued because it was unsatisfactory and interfered with the industrial operations; that, following that, the plant was greatly enlarged and could not be served except by "pooled power"; that the Commission had previously held that service which, because of industrial disabilities, had to be performed in this manner was in excess of the equivalent of "team-track delivery" and beyond a carrier's legal obligations; and that (215 I. C. C. at p. 659)—

> The record shows that, even in the event pooled power were used to perform the Staley Company's spotting, the locomotives would of necessity be required to perform such service under the control of the industry and in a manner to meet the industrial requirements. * * *

The Commission next set forth its conclusions in much the same language as in the *Allegheny Steel Co. Case* (209 I. C. C. 273), and its other reports involving spotting allowances and requiring that they be discontinued. The Staley Company filed three petitions with the Commission for reconsideration, based upon proposed or actual change in

the method of switching, the first being denied November 9, 1936, the second June 8, 1937, and the third being granted April 8, 1938, as modified by order of May 4, 1938. Prior to the effective date of the Commission's order as postponed (R. 19), the Staley Company discontinued the use of its own locomotives, and the spotting has since been done by the railroads at published tariff charges (R. 20), for a time through a "pooling" arrangement under which the Wabash did the actual spotting, and later by the Wabash, which performed the spotting for itself and as agent for the others. (R. 20–21.)

The first reopening in response to the Staley Company petition resulted in an incomplete record, and the proceedings were again reopened on the Commission's own motion. About that time, the railroads filed supplements to their tariffs voluntarily proposing the cancellation of the charges for performing the spotting at the Staley plant. The Commission suspended these supplements and consolidated the resulting suspension proceeding for hearing with the hearings in the title proceeding. (R. 21.) The evidence on the further hearings showed that the pool arrangement was discontinued because the Staley Company notified the four railroads other than the Wabash that the convenience of the industry did not require them to deliver Staley traffic at the plant and, since that time, the Staley traffic of those railroads has been interchanged with

and switched by the Wabash between the interchanges and the Staley plant. As stated by the Commission (R. 22):

> The transformation of the Staley plant from an industry directly served by five different railroads to an industry directly served by but one did not increase the transportation cost of the Staley Company, but this was and still is because of the fact that the switching charges of the Wabash for the movement between the several interchanges and Burwell yard are absorbed by the Baltimore & Ohio, the Illinois Central, the Pennsylvania, and the Terminal, as the case may be.

Following some discussion of the additional costs of the four railroads and the advantages resulting to the Wabash, the report discusses the physical changes made in the plant and plant track, *viz.*, the fact that all of the in-bound cars are delivered on the Burwell yard tracks but that, for the most part, the out-bound cars are moved out of the west end of the plant with interchange tracks in the Wabash general yard, or its storage yard. The report thereafter gives in great detail the movements involved in the in-bound and out-bound spotting; it describes the intraplant switching required by the industrial processes and discusses and gives full consideration to the fact that all engine service is supplied by Wabash engines and crews. (R. 29–31, 38.) Its conclusions

seem plainly required by the underlying facts shown and found, and to follow particularly from the size and extent of the Staley operations. The report's conclusions read (R. 43):

> *Conclusions.*—Upon further hearing, we find:
>
> 1. That on cars to and from the Staley Company, the service of transportation of respondents under their line-haul rates and charges is completed by placement of in-bound loaded cars on tracks in the Burwell yard, and begins by removal of out-bound loaded cars from tracks in the Burwell yard when such cars pass through that yard, and by removal of out-bound loaded cars from tracks in the storage yard or general yard of the Wabash when the cars do not pass through the Burwell yard but move out-bound through the west end of the Staley Company's plant.
>
> 2. That all services between the Burwell yard or the storage or general yard of the Wabash and points of loading or unloading within the plant area of the Staley Company are plant services for the Staley Company and not common-carrier services covered by the line-haul rates and charges of respondent carriers.
>
> 3. That the performance by respondents, without charge in addition to the line-haul rates and charges, of service (a) from Burwell yard tracks to points of unloading within the plant area of the Staley Com-

pany (b) from points of loading within said plant area to Burwell yard tracks on loaded cars moved to that yard, and (c) from points of loading within said plant area to Wabash storage or general yard tracks on loaded cars that do not move to the Burwell yard, would result in the Staley Company receiving a preferential service not accorded to shippers generally and would result in the refunding or remitting of a portion of the rates and charges collected or received as compensation for the transportation of property in violation of section 6 (7) of the act.

4. That the existing charge of $2.50 per car for the services described in the immediately preceding finding has not been shown to be unlawful.

* * * * *

6. That the suspended schedules have not been justified.

The lower court, in holding the Commission's order invalid, rested its decision in large part on the ground that the above conclusion 3 was unwarranted because it considered the Commission's finding of fact 5 leading up to it to be unsupported by evidence and that conclusion 3 was in fact disputed by certain evidence showing that competitors of the Staley Company were accorded spotting service under the line-haul rates and without extra charge (R. 136).

The Commission's conclusion 3 in question is to the effect that the performance by the rail-

roads without charge in addition to the line-haul rates of the spotting service at the plant of the Staley Company would result in that company's receiving a preferential service not accorded to shippers generally and would result in the refunding of a portion of the published rates in violation of Section 6 (7) of the Act. In short, the conclusion is to the effect that the performance of the spotting without the extra charge which was being exacted would be a departure from the published tariffs, which is what is forbidden by Section 6 (7), whether accomplished by special service [10] not included under the rates, by money refunds or by whatever means.

The Commission's finding of fact 5 to which the lower court refers and holds to be unsupported by the evidence reads (R. 42–43, 135–136):

> 5. All services between the tracks described in the immediately preceding finding and points of loading and unloading within the plant area of the Staley Company are services in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings and spurs.

The above finding has reference to the principles and standard laid down in the Commission's main report (209 I. C. C. 11) in which the standard prescribed of spotting service within a

[10] See *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155.

plant permissible under the line-haul rates was that such service should not exceed the equivalent of simple switching or team track delivery (see p. 13, *supra*). The said finding 5 is, it is evident, the Commission's ultimate finding of fact that the spotting service at the Staley plant is in excess of such standard.[11] And directly supporting such ultimate finding is the Commission's finding of fact 3 (R. 42) which contains the basic finding contemplated by the principles laid down in the main report (209 I. C. C. 11, 44, 45, 47). Finding 3 reads as follows (R. 42):

> 3. The movements between points of loading or unloading within the plant area of the Staley Company and the Burwell yard, the storage yard, or the general yard of the Wabash, for which respondents now make a charge of $2.50 per car, in many cases are not direct but involve one or more ad-

[11] This is manifest from the consideration that what is forbidden by Section 6 (7) is a departure from the published tariffs. Where the departure would be, as here, the performing free for a shipper of service not included in the rates, the showing of that fact alone is enough to constitute the violation, although it would also result that the shipper would enjoy a service in excess of that rendered to shippers generally under the carload rates, namely, to shippers in the receipt and delivery of traffic on team tracks or industrial sidings. Similarly, where the departure consists of the giving of unlawful allowances or rebates to a shipper, the showing of that fact alone is enough to constitute the violation although it is also true that the shipper thus enjoys preferentially lower rates than accorded shippers generally under the rates.

> ditional movements, such as to scales, intermediate storage tracks, or cleaning tracks, and in all instances are, and must be, coordinated with the industrial operations of the Staley Company and conform to its convenience.

All of the interruptions and interferences referred to find ample support in the report's earlier discussion and findings, including the finding (R. 41) that performance of the spotting necessitates a subordination of common carrier attributes to the need for coordination with the industrial processes.

As above noted (*supra*, p. 20) the lower court's holding that the Commission's conclusion 3 was unwarranted also appears to rest on the ground that the said conclusion that the performance of the spotting without extra charge would result in the Staley Company's receiving a preferential service not accorded shippers under the rates generally, is contradicted by the evidence introduced to the effect that certain competing and other plants were accorded spotting service without other charge than the line-haul rates and thus are being unduly preferred contrary to the provisions of Sections 2 and 3 of the Act. Aside from the fact that the Commission did not consider that similarity of conditions was shown between those plants and this, the lower court has apparently overlooked the distinction between the preferential service or other treatment resulting

from the departure from a published tariff (sec. 6 (7)) and the undue preference and unjust discrimination referred to in Sections 2 and 3. Just as the preference to one shipper over others resulting from unlawful refunds or rebates (sec. 6 (7)) cannot be excused on the ground that if he is deprived of them it would result in unduly preferring a competitor who continues to enjoy such refunds, similarly here the according to Staley, free, of a service not included in the rates would be the kind of preferential treatment which cannot be excused on the ground that if it were taken away from it, its competitors still enjoying the free service would be unduly preferred.[12]

The complaint herein was filed in the lower court on June 1, 1942 (R. 1). The Staley Company filed a petition to intervene on August 31, 1942 (R. 85). The action was heard by the court on April 26, 1943, being submitted upon complaint, the intervening petition, and the answers of the United States and the Interstate Commerce Commission (R. 121–122). On June 10, 1943, the court rendered its opinion, Circuit Judge Evans dissenting, holding that the order herein is invalid (R. 134–139), and on the same day entered its findings of fact and conclusions of law (R. 139). Its final decree,

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[12] See *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507, 523, 524; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Davis* v. *Cornwell*, 264 U. S. 560; *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155, 165.

entered on July 14, 1943, permanently enjoined enforcement of the Commission's order (R. 143–144). Petition of the Commission to stay injunction pending this appeal was filed June 31, 1943 (R. 145),[13] and granted by the lower court order entered July 14, 1943 (R. 149).

SPECIFICATIONS OF ERRORS TO BE URGED

The court below erred:

1. In deciding that the Commission's order is invalid and enjoining enforcement thereof.

2. In deciding that the Commission's conclusion three as to preferential service is unsupported by evidence, although this conclusion was only stating a legal fact and required no evidentiary support, and even if evidentiary support was required, the court erred in deciding the question upon consideration of a partial record, the whole of the record considered by the Commission not having been produced.

3. In deciding factual questions not decided by the Commission, and in deciding, without jurisdiction, questions of unjust discrimination and undue preference under the provisions of Sections 2 and 3 of the Interstate Commerce Act, where the Commission had not decided those questions and there is no order thereon subject to Court review.

4. In deciding that the Commission's action is arbitrary.

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[13] Through a clerical error, the record lists the filing date as July 31, 1943.

SUMMARY OF ARGUMENT

I

The Commission has determined what constitutes complete delivery, or where "transportation" (sec. 1 (3) (a)) begins and ends, with reference to the Staley plant by finding that the transportation services which the carrier appellees are obligated to perform under their line-haul rates, begin and end at the interchange track; that service beyond that point is plant service; and that accordingly carrier performance thereof, without charge in addition to the line-haul rates, would mean that the Staley Company would receive preferential service not accorded shippers generally, and would constitute an unlawful refund of a portion of line-haul rates in violation of Section 6 (7) of Part I of the Interstate Commerce Act. The determination of what constitutes delivery (or where transportation begins and ends) is one of fact for the Commission, to be decided upon evidence disclosing the actual conditions of operation. *Los Angeles Switching Case,* 234 U. S. 294, 311; *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501; *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, 757.

This Court has in recent decisions continued its recognition of the Commission's authority to decide the limitations of line-haul obligations. *Interstate Commerce Commission* v. *Hoboken Man-*

ufacturers' Railroad Co., No. 43, this Term, decided December 6, 1943; cf. *State of California* v. *United States*, Nos. 20 and 22, this Term, decided January 3, 1944; *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, this Term, decided January 3, 1944.

The Commission is expressly charged with the administrative responsibility of applying statutory provisions to determine what is or is not a part of the line-haul obligation, and to enforce the legislative prohibition against any variation from published tariffs. Sections 1 (3) (a), 6 (7), 12 (1), and 15 (1) of Part I of the Interstate Commerce Act; see also *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

II

The evidence abundantly establishes all the facts found in the supplemental report (R. 17–43) as to "actual conditions of the operation" (*Los Angeles Switching Case*, 234 U. S. 294, 311) at the Staley plant. It provides a precise description of the plant, the work of carriers in delivering and receiving cars upon the interchange track, the spotting service within the plant, the conditions under which spotting service must be performed because of the nature and requirements of the industrial operation, and the special conditions in the plant, which prevent carrier performance at the carriers' convenience. As to these findings, it appears that there is no serious claim of lack of evidentiary sup-

port. It is only contended that the Commission's finding of fact five (R. 42–43) with reference to preferential service not accorded shippers generally, is unsupported by evidence, and that conclusion three (R. 43) is consequently unwarranted.

The evidence in this case is similar in type and probative effect to that held sufficient to support the orders in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, and *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156. It is clearly sufficient under the language of the *Los Angeles Switching Case*, 234 U. S. 294, 311, where the rule was stated that questions of this type are "to be determined according to the actual conditions of operation."

The same finding as to "preferential service not accorded to shippers generally" was included in all *Ex Parte 104* supplemental reports, where the service was held to be beyond the line-haul obligation, including those decided in the several cases reaching the courts. That all shippers did not receive the same terminal services, and that some were afforded a preferential service, is clearly shown by findings of fact in the main report in *Ex Parte 104* (209 I. C. C. 11, 33–43), which report is a part of and provides the basis for all the other supplemental reports, including that in this case.

The court below holds that this case cannot be decided, as was done by the Commission, "upon

the circumstances disclosed" (*United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 411) and "evidence respecting the operations" (*ibid.*) at the Staley plant. To reach such a conclusion, the court below has considered questions of preference and discrimination under Sections 2 and 3 of the Act, although the Commission's order is based upon rebates prohibited by Section 6 (7) of the Act, and not upon preference and discrimination. The "preferential service" found by the Commission, is a necessary result of a rebate, since it must ordinarily be assumed that rebates, either direct or disguised, will not be the common practice of carriers. Rebates are commonly extended only to preferred shippers who thereby receive a "preferential service."

The district court's conclusion is based upon the partial record it considered, the whole of the voluminous record considered by the Commission in *Ex Parte 104*, 209 I. C. C. 11, not having been offered in this action. That the record before the court is only a partial record is shown by the certificate by the Commission's Secretary that only "excerpts" of the record in *Ex Parte 104* were included; a copy of this certificate appears in the transcript rather than in the printed record. Although the Commission in the *Ex Parte 104* proceedings considered several hundred industries (209 I. C. C. 11, 43), the court below only had that small part of the record which related to the Staley indus-

try, and the record upon rehearing of the supplemental report therein, which contains evidence, largely the opinion of witnesses, that certain other industrial plants, located in proximity to Staley and many of them its business competitors, receive a similar spotting service without any charge above the line-haul rates. But in the absence of the whole record, the court is limited in its consideration of the evidence to the facts stated in the Commission's report. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282; *Tagg Bros.* v. *United States,* 280 U. S. 420; *Louisville & Nashville R. Co.* v. *United States,* 245 U. S. 463.

III

The lower court erred in deciding factual questions, including questions of unjust discrimination and undue preference, and in substituting its judgment for that of the Commission on administrative questions, or in deciding those questions where they were not decided by the Commission.

Although not passed upon by the Commission, the district court has decided the factual question that the switching situation at the Staley plant is similar to switching situations at the plants of Staley's competitors and others. The Commission did not decide the fact of similarity, for that is not an issue in the question as to what is or is not embraced within the transportation obligation at the Staley plant. As approved by this Court, the Commission has here, as in other cases, decided

the beginning and ending point of transportation upon "evidence respecting the operations at [each] plant." *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 401, 411. The Commission has not considered evidence as to other plants except to say that it did "not satisfactorily show" substantially similar conditions in other plants (R. 137) and that even if there were similarity, that would only indicate need for investigations. The court below evidently considered this collateral and irrelevant evidence sufficient to warrant its decision as to similarity and ignored the principle, as approved by this Court, that each case must be decided upon its own evidence of operations.

Discrimination and preference, prohibited by Sections 2 and 3 of the Act, are questions of fact that can only be decided by comparison of one situation with other similar situations. The lower court also decided these questions, although the Commission had made no such decision. It was an unnecessary decision, since the question considered by the Commission was whether or not spotting within the Staley plant was a part of carrier transportation obligation, authority for the decision of which is really conceded, and whether or not under Section 6 (7) there would be a prohibited rebate, in the form of extra terminal service. Such issues involved no decision in respect to prohibited discrimination under Section 2 and preference under Section 3, and accordingly the Commission made none.

Decisions of fact as to similarity, discrimination and preference are administrative questions to be decided by the Commission, subject to court review. Where there has been no decision by the Commission, there is nothing for the court to review. Where there has been such a decision by the Commission, it may be reviewed within limits fixed by decisions of this Court, which do not include substitution of a court's judgment for that of the Commission on an administrative question. Here, the district court has not only substituted its judgment for that of the Commission, but has decided administrative questions where no decisions thereon were made by the Commission.

IV

It is contended that the Commission, in order to make this order valid, must simultaneously consider and decide the same question, as to other industries in competition with the Staley Company, and must compel carriers to make similar charges for similar services at the other plants if the charges are to be sustained here. The opinion below holds that otherwise a preference and discrimination (secs. 2 and 3) results against Staley. In essence, this will require the Commission in every case involving a variation from published rates in the form of extra service or some other kind of rebate, to investigate all other parties who may receive the same or similar extra service or rebate

and make decisions thereon. No service or practice could be condemned by the Commission until all similar services and practices are considered and condemned.

Seemingly, the lower court has recognized the Commission's authority to decide that the service involved is excessive, beyond the line-haul obligation, and accordingly unlawful, but it in effect holds that the order prohibiting such service cannot be made effective until the Commission has ferreted out all competitors of the Staley Company and decided the same question as to them. Such a rule would lead to an ever increasing line of newly discovered competitors, since every investigation of a new industry would uncover new competitors of that industry. It would also render futile the past decisions of this Court in sustaining similar orders of this kind. To affirm the decision, would be to destroy all practical authority of the Commission to prohibit preferences and discriminations, to force observance of published tariffs without variation, or even to enforce penalty provisions of the statutes. The answer in every case, just as here, would be that the order as to the one found guilty, could not be executed until the cases of all others who may be equally guilty are passed upon.

This action illustrates the extent of interest of industries and some carriers, to retain the opportunity for continued favor to preferred ship-

pers in the form of extra terminal services. The history of rail regulation shows a constant competitive fight between carriers over the business of large shippers. The efforts of Congress, the Commission and the courts have been to remove possibilities for preferment and to assure all shippers the same treatment in rates and service. That is why preference and discrimination are prohibited by the Interstate Commerce Act. That accounts for the provision for publication of rates and the prohibition of any variation therefrom. Long ago, carriers discovered that direct rebates could not be continued as a practice. In later years, disguised rebates or camouflaged preferments have been inaugurated.

Cooperation of the railroads rather than opposition would remove the claimed preference against the Staley Company, of which appellees complain and which the lower court found existed. It surely was not arbitrary for the Commission to delay its action, involving a task of such enormity, in the hope that claimed inequalities might be corrected by the voluntary action of appellees.

ARGUMENT

I

THE COMMISSION'S ORDER WAS AUTHORIZED BY THE INTERSTATE COMMERCE ACT

Acting under Sections 1 (3) (a), 6 (7), 12 (1), and 15 (1) of Part I of the Interstate Commerce Act

(Appendix, *infra*, pp. 83–84, 86–87, 89–90), the Interstate Commerce Commission entered an order requiring appellees, three of the five carriers serving the Staley Company, to cancel their schedules, suspended in Investigation and Suspension Docket No. 4736, under which they had proposed to cancel their tariff spotting charge of $2.50 per car, as had been established by all five carriers. In the report of May 6, 1941 (R. 17–43), it was decided that service at the Staley plant, between the points of interchange and the points of loading and unloading, was plant service, not carrier service under the line-haul obligation, and if carrier-performed, without compensation in addition to line-haul rates, would result in "preferential service not accorded shippers generally" and in rebate of a portion of the line-haul rate.

The Commission recognizes that free carrier performance of a service, which is in fact a part of the transportation obligation under the line-haul rate, is lawful and required. Allowances for such a service, where industry performed, would be justified. However, no additional service may be rendered free, after delivery has been made and transportation has ended or before it has begun. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *N. Y. Central & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, 117, certiorari denied, 243 U. S. 636.

The Commission has determined what constitutes complete delivery or where "transportation" (sec. 1 (3) (a)) begins and ends with reference to the industrial plant of the Staley Company, by finding that the transportation services which the carrier appellees are obligated to perform under their line-haul rates begin and end at the interchange track; that service beyond that point is plant service; and that accordingly carrier performance thereof, without charge in addition to the line-haul rates, would mean that the Staley Company would receive preferential service not accorded shippers generally, and would constitute an unlawful refund of a portion of line-haul rates in violation of Section 6 (7) of Part I of the Interstate Commerce Act.

The determination of what constitutes delivery (or where transportation begins and ends) is one of fact for the Commission, to be decided upon evidence disclosing "the actual conditions of operation." *Los Angeles Switching Case,* 234 U. S. 294, 311; *Atchison Ry.* v. *United States,* 295 U. S. 193, 201; *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 240; *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, 757. Appellees may well concede that the Commission possesses fundamental authority to decide where

transportation begins and ends, and may not question the validity of the supplemental orders, entered in the *Ex Parte 104* proceedings (209 I. C. C. 11), as approved by this Court. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156; *Goodman Lumber Co.* v. *United States*, unreported opinion (E. D. Wis.), and *A. O. Smith Corp.* v. *United States*, unreported opinion (E. D. Wis.), both affirmed *per curiam*, 301 U. S. 669.[14]

This Court has in recent decisions continued its recognition of the Commission's authority to decide the limits of line-haul obligations. In *Interstate Commerce Commission* v. *Hoboken Manufacturers' Railroad Co.*, No. 43, this Term, decided

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[14] In addition to these cases decided by this Court upon appeal, the following cases were decided in the Commission's favor by statutory district courts without appeal: *Louisville Cement Co.* v. *United States*, 19 F. Supp. 910 (W. D. Ky.); *Louisiana Development Co.* v. *United States*, 18 F. Supp. 629 (E. D. La.); *Elgin, Joliet & Eastern Ry. Co.* v. *United States*, and *East Chicago Dock Terminal Co.* v. *United States*, 18 F. Supp. 19 (N. D. Ind.); *Koppers Gas & Coke Co.* v. *United States*, 11 F. Supp. 467 (D. Minn.); *Sheffield Steel Corp.* v. *United States*, and *Kansas City Light & Power Co.*, Equity Nos. 2735, 2758, where two such supplemental reports were sustained by the United States District Court for the Western District of Missouri on May 10, 1937, in an unreported opinion; *Hanna Furnace Corp.* v. *United States et al.*, Civil No. 1408, another supplemental report sustained by the United States District Court for the Western District of New York, in an opinion not yet reported, decided December 6, 1943.

December 6, 1943, the Commission's order holding that the transportation involved began and ended at Seatrain cradles and that service beyond that point was not a part of the line-haul obligation, was sustained. The Court held the findings of the Commission to be decisive (pamphlet p. 7):

> We are of opinion that these findings are decisive of this appeal. The Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts. *Los Angeles Switching Case,* 234 U. S. 294, 311–14; *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402, 408; *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156, 158; *Baltimore & Ohio R. R. Co.* v. *United States,* 305 U. S. 507, 525–6; *Swift & Co.* v. *United States,* 316 U. S. 216, 222–5, and cases cited. In the *Tin Plate* and *Pan American* cases this Court sustained the Commission's order prohibiting, as in violation of § 6 (7) of the Act, payment of allowances to an industry by rail carriers for spotting cars on its industrial tracks. The Court accepted as controlling the Commission's findings that under prevailing conditions and practice the interchange tracks of the industry were convenient and usual points for the receipt and delivery of the interchanged cars, that the rail line-haul service accordingly ended there and that for that reason the industry

> performed no service in spotting cars on its own tracks for which the rail carrier was compensated under its line-haul tariffs * * *.

The procedure and method here adopted by the Commission to administer and enforce regulations enacted by Congress is common to agency administration. The Commission is charged with the administrative responsibility of applying statutory provisions to determine what is or is not a part of the line-haul obligation, and to enforce the legislative prohibition against any variation from published tariffs. Sections 1 (3) (a), 6 (7), 12 (1), and 15 (1) of Part I of the Interstate Commerce Act. The tools fashioned by the Commission in *Ex Parte 104,* 209 I. C. C. 11, have been used here in one of the many situations discovered to correct a wrong that was found to exist. This Court had recently recognized the necessity for such authority in *State of California* v. *United States,* Nos. 20 and 22, this Term, decided January 3, 1944, pamphlet pp. 4, 6, and *Federal Power Commission* v. *Hope Natural Gas Co.,* Nos. 34 and 35, this Term, decided January 3, 1944, pamphlet p. 19.

Appellees may attempt to distinguish cases previously decided on the ground that free carrier spotting differs from allowances to the industries for performing their own spotting, as involved in the other cases. The basis of allowances is industry performance of a service which could not be

performed free by the carriers. In *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 510, it was held that the service performed by the warehouse was one that the carriers would not be authorized or permitted to perform, even at their own stations, and if performed by them would nullify published rates for carload shipments. The same rule would not permit or authorize carriers to perform the service for which industries were paid allowances. Clearly, it was the service involved and not the payment of allowances which controlled.

At the time of the Commission's decision in the first Staley supplemental report (215 I. C. C. 656), that company (as in *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402, and other cases) performed its own spotting service for which it was paid allowances. The first Staley petition for reconsideration was based upon its proposal to substitute free carrier service for its own (R. 20). That substitution was made, and later carriers filed tariff charges for the service (R. 21). Practically, the contention here is that the railroads should perform free of charge the same service, which when performed by Staley was condemned as an allowance.

The opinion in the *American Sheet & Tin Plate* case, *supra,* makes it clear that it is the service, held as not within the line-haul obligation, and not merely the question of allowances paid, that

determined the issues involved. Allowances are recognized by the Commission and the Court as authorized and lawful where industry performs a service which carriers are bound to perform under their line-haul obligation. Allowances are properly recognized as one of various disguises under which rebates are attempted. Free performance by carriers of a service not included in the line-haul obligation is equally recognizable as a disguise for rebates.

In two cases reaching the courts, one decided by this Court and the other by a statutory court, the Commission's orders to cease service performed by carriers and held not a part of the line-haul obligation, were sustained. The *Weirton Steel Company Terminal Allowance* case, 209 I. C. C. 445, was one of six cases consolidated and decided upon appeal in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. This Court there saw no difference in principle between free carrier performance of the service and performance by industry under allowances, for the *Weirton* case, with its free carrier service, was treated exactly like the other five cases with service by industry and allowances therefor. The Commission's report and order in the *Weirton* case (the 15th supplemental report under *Ex parte 104*) found, just as was later found in the (Staley) 55th supplemental report upon rehearing (R. 17), that the service was a plant service for which line-haul rates did not com-

pensate, that free carrier service or an allowance for industrl performance would result in a preferential service not accorded shippers to generally, and would refund or remit a portion of the line-haul charges in violation of Section 6 (7) of the Act (see 209 I. C. C. at p. 448). The order accordingly prohibited free carrier service or allowances for industry performance thereof.

The other case, *Inland Steel Co.* v. *United States,* 23 F. Supp. 291 (N. D. Ill.), involved seven actions (consolidated and decided in the one opinion) brought by industries seeking to set aside and enjoin orders of the Commission, also issued under supplemental reports in the *Ex parte 104* proceedings. One of the appellants was Crane Company of Chicago, whose case had been decided by the Commission as the 34th supplemental report. The Commission's conclusions in that case were (210 I. C. C. 210, 212):

> We find that the service performed beyond the interchange tracks in the southwest corner of the plant, described of record, is an industrial service which respondents are not obligated to perform and for which they were not compensated under their line-haul rates; that performance of said service by respondents without reasonable charge therefor results in the industry's receiving a preferential service not accorded to shippers generally; and that the performance of said service by the respond-

ent carriers results in a violation of section 6 of the act.

An appropriate order will be entered.

The Commission's conclusions in the *Crane* case as to "preferential service not accorded to shippers generally" resulting in a violation of Section 6 (7) of the Act, were the same as in the present case. The statutory court approved the Commission's order. Crane & Company did not appeal, and since the court's decision that company has been subject to a charge for spotting service if the service is performed by carriers.

The basis for the district court's opinion in the instant case is that discrimination and preference against the Staley Company result from the Commission's order. Yet, the same type of discrimination and preference results from the Commission's order in the *Crane* case. Actually, to relieve Staley of this claimed discrimination, as the court below did, would amount to judicial discrimination against the Crane Company. It can hardly be gainsaid, that if Staley is entitled to free spotting service because its competitors have not been subjected to the same charge by orders of the Commission, by the same standard Crane is entitled to free spotting service since its competitors have not been subjected to a similar charge. And it should be noted that Judge Lindley who wrote the opinion covering Crane & Company in the *Inland Steel* case joined in the majority

opinion (Circuit Judge Evans dissenting) in the present case.

II

THE COMMISSION'S ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

As shown in the Statement (*supra*, p. 14), spotting at the Staley plant is a complicated service and is coordinated with plant operations. It is a situation in which carriers cannot, at their own convenience, perform the switching. It requires assignment of engines and crews, operating regularly and doing no other work. Just as approved by this Court in other supplemental orders, "the Commission found, upon sufficient evidence, that the cars were, in the first instance, placed upon lead tracks, interchange tracks or sidings and subsequently spotted from these tracks; in each instance the spotting service involved one or more operations in addition to the placing of the car on interchange tracks, such as moving it to plant scales for weighing, or some additional burden, such as conformance to the convenience of the plant, supply of special motive power required by the plant's layout or trackage or some other element which called for some excessive service greater than that involved in team track spotting or spotting on an ordinary industrial siding or spur." *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 411. The

Court there concluded (*ibid.*) that this type of evidence supported the findings and order there involved.

The same type of evidence supports this *Ex Parte 104* supplemental report and order. The report recites in detail changes made in the effort to escape results of the previous order condemning allowances. A full description is afforded of the plant with its interchange tracks, numerous points of loading and unloading, intricate system of interlacing plant tracks and spurs, the many instances of two or more movements of cars, and the manner in which spotting to and from the plant is accomplished by the use of engines and crews regularly and exclusively assigned to that work, frequently involving free storage of cars in Wabash yards, and generally accommodating carrier service to the needs of the industry. The evidence clearly reveals how large-volume freight can cause carriers to make changes, at great and continuing expense, to conform to an industry's plan and operation and how some carriers thereby obtain by competitive advantage a greater than fair share of line-haul freight.

The complaint (R. 12) alleges that the Commission's finding that the Burwell yard, the interchange track, may not properly be treated as a Wabash yard, is unsupported by evidence. That merely expresses a different interpretation on the part of appellees as to what the evidence shows the Burwell yard to be. Under the evidence, the

Commission found the yard to be the same interchange track as formerly (R. 28). It is not denied that the Burwell yard was originally constructed and used by the Staley Company as an interchange track; that under the condemned allowance practice, all traffic, except that of the Baltimore and Ohio Railroad, was switched by carriers to tracks in the yard and from there spotted by Staley engines; that the yard continued as the interchange point after substitution of carrier for industry spotting, until June 1, 1938, when it was leased to the Wabash Railroad Company for 10 years, for a consideration of $1.00 and an agreement to pay taxes and maintain tracks; and that it was thereafter used by the Wabash as the point to which in-bound traffic was first switched, and from there spotted within the plant. It is not denied that the yard was used almost entirely in connection with Staley traffic, that Wabash rarely used the yard for other operations, or that Wabash, under the changed arrangement, incurred considerable expense to build necessary track connections to make the yard usable for Staley traffic. Appellees contend that the lease of yard and the change of name of its management in fact changed its character from a Staley interchange track to a Wabash yard. Nevertheless, regardless of nomenclature, it remained the same interchange track. Obviously, the lease to Wabash was but another of the several changes made, by cooperative effort of this industry and these car-

riers, to avoid the Commission's previous decision that spotting service within the plant is not a part of a carrier's line-haul obligation. Appellees seem to lose sight of the fact that it is the plant situation which determines the character of service, and that interchange tracks are not the controlling factors. Certainly the service could be, because of other facts, beyond the line-haul obligation, even where there is no named interchange track. The question is whether or not points of loading and unloading within the plant can be reached in one switching movement without obstacles or interference by plant operations. Moreover, the opinion of the court below considered as inconsequential the allegations of the complaint in respect to lack of evidentiary support for findings as to conditions of operation at the plant, since that feature of the complaint is ignored.

Except as to the Burwell yard, appellees accept, as supported by evidence, all the other findings of the Commission as to actual conditions and operations. The complaint and the opinion below are not concerned with "the circumstances disclosed," *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 411, and the "evidence respecting the operations at the plant" (*ibid.*) of the Staley Company. They are instead interested in a comparison of these operations with the situations at other industrial plants, particularly those which are in competition with the Staley Company.

The lower court only held that evidence is lacking to support the finding of fact five (R. 42–43) and therefore conclusion three (R. 43) as to "preferential service not accorded to shippers generally."

A. CONCLUSION OF LAW THREE IS ONLY A STATEMENT OF A LEGAL FACT AND REQUIRES NO EVIDENTIARY SUPPORT

The court below concluded that it is necessary to find under Section 3 whether the spotting service is in fact preferential to Staley as compared to competitors of that company. Under the Act, preference is not a required finding, as a part of a decision fixing limits of transportation. That decision is to be based upon evidence of conditions of operation at each plant. *Los Angeles Switching Case,* 234 U. S. 294, 311. The Commission's decision here, as in all *Ex Parte 104* supplemental reports, is not based upon a comparison of conditions at the Staley plant with the conditions at other plants, but solely upon what the evidence shows of the actual situation at the Staley plant. The "preferential service" found here by the Commission and included in finding of fact five and conclusion three, which the court finds are unsupported by evidence (R. 139), is simply a statement that such "preference" necessarily flows from every violation of Section 6 (7) of the Act.

The Commission found in its main *Ex Parte 104* report (209 I. C. C. 11, 45) that free service

beyond the point where transportation begins and ends, or payments of allowances therefor when performed by the industries themselves "provides the means by which the industry enjoys a preferential service not accorded to shippers generally." That is of course not a finding of preference under Section 3, but is only stating the legal fact that preference necessarily results from any and all departures from established tariffs. If facts show a rebate in the form of terminal services, not compensated for by line-haul rates, it is "preferential service" as a matter of law. That is correct whether there is any evidence to show the fact of preference, or whether all shippers included under the evidence are shown to receive service without compensation. Under Section 6 (7) of the Act, free service to all shippers is prohibited. All variation from established rates is a "preferential service", without reference to whether or not the same variation is made for any or all shippers.

Unlike the court below, this Court does not regard "preferential service not accorded shippers generally", the Commission's conclusion in question, to mean "discrimination" under Section 2 and "preference" under Section 3, which if found, would obviously require evidentiary support. In *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, the issue was lawfulness of allowances and free spotting service, as paid

or rendered to those industries, covering the terminal services involved. The first question raised (301 U. S. at p. 406) by appelles in their opposition to those orders, was that necessary quasi-judicial findings had not been made, since the Commission had held that the allowances furnished a means by which an industry enjoyed a preferential service, not accorded shippers generally, and constituted a rebate in violation of Section 6 (7) of the Act. It was insisted that such conclusions were not sufficient to support the order because the Commission must find under Sections 2, 3, and 15 (1) of the Act, that the practice was unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful.[15] Appellees

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[15] The Court disposed of these issues as follows (301 U. S. at pp. 406–407):

> If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates. These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight. The statute contains this definition: "The term 'transportation' shall include * * * all services in connection with the receipt, delivery, elevation, and transfer in transit * * * of property transported." The Interstate Commerce

there claimed that under Section 6 (7) the allowances involved were permissible if provided for by tariffs and that they did not constitute unlawful rebates. The question as to "preferential service not accorded to shippers generally" was not there considered by appellees or the Court to be a finding of unjust discrimination and undue preference under Sections 2 and 3. The "preferential service" there is precisely the same finding as here and rests upon the legal fact that the practice is a violation of Section 6 (7). The finding as to "preferential service" is not one which would require evidentiary support since the preferential service referred to by the Commission is only that which necessarily flows from the violation of Section 6 (7).

It is evident that the lower court erroneously regarded this conclusion three (R. 43) to be the same as "unjust discrimination" and "undue preference" prohibited by Sections 2 and 3. But in both *American Sheet & Tin Plate Co.* v. *United States,* 15 F. Supp. 717 (W. D. Pa.) and *Pan-American Petroleum Corporation* v. *United*

Commission is authorized and required to enforce the provisions of the Act and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, "or otherwise in violation of the provisions of this act," to determine what practice is or will be just, fair and reasonable to be thereafter followed and to made an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist.

States, 18 F. Supp. 624 (E. D. La., S. D. Tex.), the lower courts were reversed (301 U. S. 402; 304 U. S. 156) for holding that the Commission was limited by its statutory authority as to practices involved in terminal services, to the question whether or not such services or practices were, under other Sections of the Act, unreasonable, unjust and preferential, unduly discriminatory, or otherwise unlawful.

This Court has clearly held that no quasi-judicial findings of unjust discrimination or undue preference are necessary to the validity of an order fixing the bounds of terminal services, where, as here, the Commission based its order upon other Sections of the Act. *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156; *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402; *Goodman Lumber Co.* v. *United States,* 301 U. S. 669; *A. O. Smith Corp.* v. *United States,* 301 U. S. 669; see *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 511; *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, 759; *Assigned Car Cases,* 274 U. S. 564, 579. Despite these opinions, appellees contend that evidentiary support is necessary and lacking for the "preferential service" conclusion three (R. 43) although, as related in the main report (209 I. C. C. 11, 33), this is only stating a legal fact.[16] There is really no

[16] The Commission quoted the following excerpt from *Davis* v. *Cornwell,* 264 U. S. 560, 562: "It was not necessary to prove that a preference resulted in fact."

difference between the quasi-judicial finding issues of the above cases and the issue raised here as to lack of evidentiary support for conclusion three. Appellees' position here, just as in the decided cases, would be sound if the findings were limited to the practices specified in Sections 2, 3, and 15, but the findings are not so limited. The supplemental report and order here are the same as those already sustained by this Court. And if it were unnecessary to enter quasi-judicial findings as to "preferential service" in the sustained orders, it follows that the same "preferential service" of this order requires no evidentiary support. As said by this Court in *Davis* v. *Cornwell*, 264 U. S. 560, 562, "The assumption by the carrier of the additional obligation was necessarily a preference." See also *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155, 165.

The view urged by appellees would impose an impossible task upon the Commission, as was stated in a comparable situation in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 223–224:

> The issue to be resolved in the present proceeding is whether the service rendered by appellant at its Chicago stockyard brought it within the jurisdiction of the Commission. To this issue the practices by others at other yards are irrelevant and their bearing on the administrative construction of the statute in the present circumstances is, we think, too remote and indecisive to com-

pel a burdensome inquiry into collateral issues.

* * * * *

But mere inaction, through failure of the Commission to institute proceedings under § 15 (7), is not an administrative ruling and does not imply decision as to the Commission's jurisdiction. If the failure to act in the case of yards other than the present one is to be taken as an administrative construction of the statute persuasive here, we would be forced to conclude that a jurisdiction which the statute has plainly conferred either on the Secretary or the Commission, has been lost, although, with respect to this appellant, jurisdiction has been consistently asserted by the Commission, while the Secretary has as consistently remained passive. There is a practical limit to which inquiry into collateral issues may be extended in pursuit of the trivial. We think that limit was reached here.

Cf. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 688–689; *Interstate Commerce Commission* v. *Columbus & Greenville Ry.*, 319 U. S. 551, 557–558.

B. EVEN IF CONCLUSION THREE REQUIRED EVIDENTIARY SUPPORT, THE COURT ERRONEOUSLY DECIDED THIS QUESTION UPON A PARTIAL RECORD

In deciding that the Commission's conclusion three, as to "preferential service not accorded to

shippers generally" (R. 43), was unsupported by evidence, the lower court based its decision upon a partial record, for the whole record was not before it.

In order to decide the question of evidentiary support for this finding of preference, the district court has erroneously ignored the important findings as to the switching situation at the Staley plant, the conceded authority of the Commission to decide what is embraced in the "transportation" (sec. 1 (3) (a)), the fact that this is not a finding of undue preference under Section 3, and that it is not a finding of fact but rather a statement of a legal fact, which requires no evidentiary support. In spite of all these seemingly unsurmountable legal obstacles to any decision with reference to evidentiary support for the finding, the court below decided that question upon the basis of a partial record. It has ignored the obvious fact, clearly insisted upon by appellants (see R. 132, 151), that the record considered by the court is only a part of what was before and considered by the Commission, and that the whole of the record was not produced.

Opinions of this Court extending over many years have so definitely recognized the necessity for producing the whole rather than a partial record, to permit the courts to review findings of the Commission, that the question would seem to be beyond argument. The rule has been repeatedly

stated that courts may review orders of the Commission to see whether the evidence supports the findings only when the whole record is before the court, since the part of the record not before the court may provide the needed support. The rule is stated in *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286, as follows:

> The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. *Spiller* v. *A., T. & S. F. Ry. Co.,* 253 U. S. 117, 125; *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114, 116; *Nashville, C. & St. L. Ry. Co.* v. *Tennessee,* 262 U. S. 318, 324; *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 148; *Chicago, I. & L. Ry. Co.* v. *United States,* 270 U. S. 287, 295. The appellant did not free itself of this restriction by submitting additional evidence in the form of affidavits by its officers. For all that we can know, the evidence received by the Commission overbore these affidavits or stripped them of significance. The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. Quite manifestly they do. * * *

See also *Louisville & Nashville R. Co.* v. *United States,* 245 U. S. 463, 466; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117, 122, 125; *Louisiana and P. B. Ry. Co.* v. *United States,* 257 U. S. 114,

116; *Tagg Bros.* v. *United States*, 280 U. S. 420, 443.

There can be no question that the record upon which this order is based is only a partial record. The title of the report (R. 17) shows that it is a part of the general investigation under *Ex Parte 104*, 209 I. C. C. 11. Furthermore, this Court has recognized supplemental reports as being a part of *Ex Parte 104* proceedings. *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

The Commission said in its main report (209 I. C. C. 11, 43):

> Involved in this proceeding are approximately 200 industrial plants where spotting allowances are paid; and also numerous plants at which respondents assign locomotives to perform spotting service beyond the points of interchange. In either case a second placement of cars is made. * * *

Obviously, the partial record considered by the district court did not contain the evidence as to the several hundred industrial plants which had been investigated and the evidence as to which was contained in the whole record.[17]

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[17] Only a part of transcript volumes 3, 4, and 7 were produced, and none of transcript volumes 1, 2, 5, and 6 were produced. The partial record offered and considered by the court begins with transcript volume 3, p. 2220, omitting the first 2,219 pages, and it omits the entire transcript from p. 3777, volume 4, to p. 7134, volume 7.

The question of preferential service and lack of support therefor was urged by appellees in *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402, where the complete record was before the Court. The opinion took no note of the sufficiency of evidentiary support for the preferential service finding but considered only the necessity for findings under Sections 2 and 3, as raised thereby. The Court either conceived the point to be too frivolous for discussion or that the complete record there before the Court contained supporting evidence for the finding. At any rate, the opinion in the *American Sheet & Tin Plate Co.* case referred to the complete record, which was there offered in evidence, as follows (301 U. S. at p. 404):

> Voluminous evidence was adduced largely consisting of testimony by operating officials of carriers and traffic representatives of shippers touching the service of spotting cars at points upon the systems of plant trackage maintained by large industries. The Commission's report summarized its conclusions based on the evidence as to conditions at approximately two hundred industrial plants where spotting allowances were paid by the carriers and numerous plants where such services were performed by the carrier. * * *

No such record was offered for the consideration of the lower court herein.

III

THE DISTRICT COURT ERRED IN DECIDING FACTUAL QUESTIONS, INCLUDING QUESTIONS OF DISCRIMINATION AND PREFERENCE, AND IN DECIDING ADMINISTRATIVE QUESTIONS NOT DECIDED BY THE COMMISSION

The court below has found two facts, neither of which was determined by the Commission, and neither of which was necessary or required under previous decisions of this Court, to render the report and order herein valid. It has found that the switching situation at the Staley plant was similar to that at other nearby and competing industries, and it has found that discrimination and preference, prohibited by Sections 2 and 3, resulted against the Staley Company because of the order. Both are factual decisions of the lower court and not a review of a decision of the Commission, for those facts were not determined by the Commission.

Such decisions belong to the administrative function of the Commission. When made, they are subject to court review under well defined limits, as fixed by previous decisions of this Court. However, in reviewing such orders a court may not, under the primary jurisdiction doctrine, substitute its judgment for that of the Commission on an administrative question, decide questions of fact differently where there is evidentiary support for the order, or decide factual and administrative questions originally where there is no decision of the Commission thereon. As was said in *Inter-*

state Commerce Commission v. *Union Pacific R. R.*, 222 U. S. 541, 547:

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

See also *Armour & Co.* v. *Alton Railroad Co.*, 312 U. S. 195; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 136, 146; *Virginian Ry.* v. *United States*, 272 U. S. 658; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; cf. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

The court below has not confined itself to a review of the Commission's order, but, as essential

to its conclusion, has decided facts for itself. The opinion (R. 136) states in some detail the switching situation at plants of claimed competitors of the Staley Company. In effect, the court has found as a fact, that "actual conditions of operation" (*Los Angeles Switching Case,* 243 U. S. 294, 311) and "evidence respecting the operations at the plant" (*United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402, 411) of each of the named Staley competitors, is such as to require a spotting charge at those plants if a spotting charge is to be imposed here. Surely the district court has not intended to establish a principle which would require a spotting charge at the Corn Products plant, for example, simply because that industry is in competition with Staley. If such a principle should be established, it would empower the Commission to order a spotting charge against all industries proven to be competitors of the one involved in the case before it, without investigation, hearing, or knowledge of the "actual conditions of operation" in the competitive plant. The Commission prefers to follow the principle stated by this Court in the *American Sheet & Tin Plate Co.* case that "evidence respecting the operations at [each] plant" (301 U. S. at 411) is necessary to such a decision. Obviously, it is possible for "actual conditions of operation" (*Los Angeles Switching Case,* 243 U. S. 294, 311) at one plant to warrant and require a spotting

charge since outside the line-haul obligation, while at a competing plant "evidence respecting the operations" may show that the spotting is within the line-haul obligation, and therefore no charge could be made therefor. The Commission has not here looked to conditions at the plants of Staley's competitors, believing it desirable and necessary to ascertain, by separate investigations, the "evidence respecting the operations" at those plants, and deciding the question only after each industry has been given a full and fair hearing. No order has been entered in those cases which could be reviewed by the court.

Under opinions of this Court, it would be error for the Commission to attempt decision as to spotting service at any plant, in the absence of evidence of the actual switching situation involved and a hearing for all parties. See, *e. g., United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156. The plants competing with Staley were not before the Commission under any proceedings then pending, and testimony concerning the situations at such plants was merely collateral and irrelevant to a determination of the conditions at Staley. *Union Stock Yard Co.* v. *United States,* 308 U. S. 213, 224.

The court below has also decided that discrimination and preference against the Staley Com-

pany, prohibited by Sections 2 and 3 of the Act, have resulted from the Commission's action.[18] This is another determination by the court which had not been made by the Commission. Yet, what constitute undue preferences and unjust discriminations are questions of fact confided to the judgment and discretion of the Commission. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481; *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 352–353; *Board of Trade of Kansas City* v. *United States,* 314 U. S. 534, 546; *Barringer & Co.* v. *United States,* 319 U. S. 1. Such questions must be resolved initially by the Commission, subject to review by the courts. No proceedings concerning such questions have been instituted before the Commission, either upon complaint of interested parties or by the Commission upon its own motion.

The complaint and opinion below clearly show (R. 11, 137, 138) that the "preference and discrimination" alleged and found were by comparing the Staley situation with the situations of other shippers in the same locality and on the lines of these carriers, or in direct competition with the Staley Company. However, Section 6 (7) does not contemplate such a limited comparison be-

[18] In effect, the court has found as a fact that the Commission committed a forbidden discrimination and preference (R. 138). The Act only forbids carriers to commit such acts (secs. 2, 3) and makes the Commission responsible for these factual determinations.

tween a shipper and his neighbors or competitors. A "preferential service" (R. 43) flowing from a violation of Section 6 (7) must be found by comparing any preferred shipper to another, even though separated by the continent and engaged in an entirely noncompetitive business. An allowance or free service condemned by the Act constitutes a rebate whether extended to a favored steel industry or a food-processing company, to a lumber company in Oregon or to a stockyard in Chicago. The character of the service would be equally wrong for all shippers in all businesses, and the same service must be given every community as that which may be given to the preferred community. "Shippers generally" as conceived by this complaint and the court below, are only those in close proximity to the Staley Company, but the vision of the Commission under statutory direction must include all shippers of whatever kind and every community.

The court below in attempting to distinguish cases already decided by this Court, held (R. 138) that the question of discrimination was not before this Court in the *American Sheet & Tin Plate Co.* and *Pan American Petroleum Corp.* cases, *supra,* (301 U. S. 402; 304 U. S. 156), and that in those cases the Court was dealing with a number of like orders relating to a group of competing industries. However, neither the Commission nor the Court has, in these *Ex Parte 104* supplemental reports, dealt with a number of like orders in

relation to a group of competing industries. This Court has considered on appeal cases involving steel companies, petroleum companies, lumber companies, and others. See p. 37, *supra*. Lower courts have decided cases involving a number of industries, and supplemental reports have dealt with even a larger variety.[19] See fn. 14, p. 37, *supra*.

IV

THE COMMISSION'S ORDER IS NOT ARBITRARY

One of the grounds upon which the lower court held the order invalid was that it is unjust and unreasonable (R. 139). This is equivalent to holding that the order is invalid because arbitrary. This viewpoint was based upon a conception that it was the duty of the Commission, in deciding the question of terminal service at the Staley plant, to decide the same question as to industries in competition with that company. However, such action is not required of the Commission by statute or decisions of this Court.

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[19] The *Ex Parte 104* investigation was country-wide in scope and dealt with a number of different kinds of industries and was not confined to a particular class of industry or a particular rail line or locality. Not all of the industries in the various classes investigated, or even all of those of a particular locality or on the lines of a particular railroad were included in these investigations. In order that the Court may realize the scope and kind of industries considered, a list of all supplemental reports entered by the Commission is attached hereto as Appendix II, citing Commission reports and a statement of the location and nature of industries involved.

That some inequality may result from this order and from the fact that other cases have not yet been decided by the Commission is possible. The Commission has not decided the possible question of inequality for it has not had facts before it sufficient to decide such a question. To assure validity of the order here considered, it is not required to make such a decision. The court below has decided the question of inequality, on the basis of facts contained in a partial record, which were deemed by the Commission as insufficient to show substantial similarity between the operations involved at Staley and its competitors. On that basis, the district court held that the recognized authority of the Commission to decide where transportation begins and ends at a particular plant cannot be exercised until the Commission, by its voluntary action, forces carriers to apply the same kind of tariff charges to other competing industries.

The effect of the ruling below is that where the Commission discovers a prohibited rebate granted a particular industry, it cannot, under conceded authority, take action to stop it until every other rebate, claimed as similar and made to competing industries, is simultaneously stopped by the Commission's action taken on its own motion. The decision below would result in permitting continuance of a recognized variation from published rates prohibited by Section 6 (7) until the Com-

mission can make a decision as to all other like rebates and stop them simultaneously.

Such a rule would require of the Commission a herculean if not an impossible task; it completely overlooks the practical problems involved in ridding railroad operation of rebates, such as this, and the possibility that an authority other than the Commission might act to remove the preference and discrimination found by the court. To say that the Commission is solely responsible for that preference and discrimination, and that failure of the Commission to force carriers to equalize spotting charges, justifies continuance of a rebate, would eliminate ordinary practical solutions of such problems, would place an insurmountable obstacle upon the Commission's efforts to carry out its duty in enforcing the Interstate Commerce Act, and would greatly enlarge the opportunity for carriers to continue the practice of rebates to favored shippers.

The struggle of railroads to avoid the Commission's authority, under Congressional mandate, to remove all discriminations, preferences, and rebates, has been long and tedious. Rail management has been most reluctant to give up favoritism as an instrument of competitive advantage, by use of which they are able to procure a greater share of freight. Volume freight is the reward of rebates, and for this reason large shippers have been recipients of this largess. Congress, the Commission and the courts, representing "the scattered and unorganized sufferers from favoritism"

(*Chicago & Alton R. Co.* v. *United States*, 15 Fed. 558, 562 (C. C. A. 7), affirmed, 212 U. S. 563) have struggled to procure equal treatment for them. In later years, carriers and preferred shippers have resorted to a variety of disguises, designed by their cooperative effort to evade legislative prohibitions against rebates. Where removal of the disguise has revealed the rebate, it has been found in variegated form, such as transporting free private cars of other carrier officials;[20] allowances to warehouses, under contract, to assemble less than carload freight into carloads at carload rates;[21] the payment of allowances to industries for performance of their own spotting service, under claim that the service was a part of carrier obligation;[22] and many others.

Terminal services were long recognized as a prolific field for rebates, having been the subject of both many decisions[23] and of railroad associations' efforts to provide uniform and equal service for all shippers through universal rules voluntarily adopted by all carriers (see *Ex Parte 104*, 209 I. C. C. at p. 18). Failure of the cooperative railroad effort inevitably led to the Commission's action, upon its own initiative, in *Ex Parte 104*,

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[20] *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740.

[21] *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501.

[22] *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

[23] See, *e. g.*, *Car Spotting Case*, 34 I. C. C. 609; *Gallagher* v. *P. R. Co.*, 160 I. C. C. 563.

209 I. C. C. 11. It was there found that excessive terminal service was rendered to many industries, being greater in some sections of the country than others, greater for some industries than for others, even on the same line, and that it amounted to a widespread preference and rebate in violation of law.

Investigations under *Ex Parte 104* included hundreds of industries throughout the country, and seventy-four of those cases have been decided by the Commission under supplemental reports. Thirty-one of these supplemental orders have been subjected to judicial review and approved, in addition to other orders where judicial action was dismissed in view of decisions of this Court. The investigation and consideration under *Ex Parte 104* was not, as the lower court seemed to think (R. 138), limited to a group of competing industries where allowances were paid, or to a particular part of the country.

Reference to all supplemental reports, entered to present date (Appendix II) will disclose continuance of investigations and decisions of cases involving a wide diversity of industries all over the country. These cases are found in 22 States, and relate to 25 different industries, including iron, lumber, oil, cement, paper, automobile manufacturing, glass, mining, meat packing, salt, and food processing.

In view of these facts, the finding (R. 138) of the court below that proceedings in *Ex Parte 104*, or

judicial decisions on supplemental orders thereunder, were concerned only with a group of related and competing industries, was entirely unjustified. No one has yet plumbed the extent and ramification of excess terminal services presently existing, or could know the number of such possible cases that may have to be investigated and decided by the Commission, if compelled to do so because of the opposition and non-cooperation of rail carriers.

The Commission from the beginning understood the tremendous scope, the multitude of industries, and the enormous task and difficulties involved. That it must be finished if equality of treatment for all shippers is to be assured, appears necessary on the face of the facts already established. No one could gainsay the justice and statutory purpose to provide an equal terminal service to all. That can be provided only when all are given the same service, granted the same allowances, and charged alike for that in excess of transportation included under line-haul rates. As stated by this Court, that determination must be upon the evidence of conditions of operations at each particular plant. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156. Evidence as to one plant obviously could not disclose operating conditions at another plant. Comparison of similarity between two plants affords

no practical basis for decision, since each case must be heard on its own record, with a full hearing and opportunity to submit evidence.

The vastness of this problem and the time required for completion of its solution by the Commission would appear obvious. Yet the court below holds (R. 139) that the Commission must devise some over-all solution and decide all competitive cases simultaneously, or at least within some arbitrary limit to be decided by that court in this case, and by other courts in other cases, and that failure of the Commission so to decide all cases renders invalid the order in the one case reached and decided.

There is another solution of the problem possible in a very short time and with little effort, a solution known to and recognized by the Commission since long prior to the beginning of *Ex Parte 104*, 209 I. C. C. 11. Carriers may decide, where the Commission has not acted, what is or is not a service in excess of the line-haul obligation, under principles already established, and if beyond that limit may voluntarily provide a tariff charge therefor. Efforts of carrier associations to establish rules to assure uniform practice and rates respecting terminal services (see p. 68, *supra*) recognized the carriers' opportunity to accomplish that purpose by their own voluntary action. It cannot be doubted that rail carriers know the possibility of this simple solution, and that they could, if they were willing

to cooperate, establish tariffs providing for equality of charges where they believe, as alleged here, that there is a similar service.

In such a situation, where the Commission knew the enormity of the task, if it were to undertake compulsory enforcement of established principles governing terminal services for all industrial plants within the nation, it was surely not arbitrary to enter "sample" orders which could easily be followed by the voluntary action of carriers. Here the carrier appellees insist that if the Staley Company is required to pay a spotting charge, its competitors must also be required to do so.

Appellees contend, and the court has so found, that unequal treatment has been accorded the Staley Company as compared to competing industries solely because the Commission has failed to decide as to the spotting service at those other plants. If they believe their own allegations, they must fully understand that application of the principles established by the Commission with this Court's approval would require a tariff charge for those other plants, and that the services there involved are not a part of their line-haul obligation. They do not here seek to provide a charge for those other industries which they and the court seem to think would equalize the treatment of the Staley Company, but rather are seeking to avoid all possibility of fixing a charge at those plants and at the Staley plant, regardless of the kind and character of service involved.

If, as appellees claim, they render a similar service free to other industries as that decided by the Commission in the instant case to be beyond the line-haul obligation, it is apparent, under principles approved by this Court, that such service is not a part of their obligation. See, e. g., *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156. If they know this to be true, they need not await the Commission's compulsion to force them to act. Carriers are free to establish their own tariffs. Tariffs are not initiated by the Commission, whose only function is to decide the justness and reasonableness of those filed by carriers. Surely these carriers have understood, from principles established by approval of this Court, what kind of terminal service is or is not a part of their line-haul obligation, and could if they wished conform thereto. Here their voluntary application of these principles would, if their allegations are correct, remove the very preference and discrimination of which they complain.

Appellees contend (R. 10) that it was a duty and responsibility of the Commission to make certain that any order it entered did not result in unjust discrimination in violation of Section 2 or undue preference in violation of Section 3. With this view the lower court agreed (R. 138). The Act places no such duty or responsibility upon the

Commission but does prohibit such acts when committed by carriers. It may therefore be seen that whatever inequality may result from this order, is not because of the non-action of the Commission, but rather because of the nonconformity and non-action of these carriers, who could not fail to have understood principles so clearly stated and firmly established.

In the past, carriers have decided for themselves what is embraced in transportation under line-haul rates, not always alike. Those in New England and the Southeast regarded limits of this transportation as fixed by the nature, desires or disabilities of a plant, and that interchange tracks were proper points for receipt and delivery of freight. (209 I. C. C. at pp. 33–34.) Carriers decided the question differently even as to plants operated by the same company, as shown by supplemental reports [24] of the Commission under *Ex Parte 104.*

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[24] The Wheeling Steel Corporation (decided as the forty-sixth supplemental report, 214 I. C. C. 53), operated seven plants, three with free carrier switching, three with allowances for industry switching, and one where carriers refused allowances, which action was approved by the Commission (*sub nom. Whitaker-Glessner Co.* v. *B. & O. R. R. Co.*, 63 I. C. C. 47). The supplemental report approved the free carrier service at three plants and canceled all allowances. The Commonwealth Edison Company (decided as the forty-ninth supplemental report, 215 I. C. C. 173) operated five plants, four with industry-performed spotting, two under allowances and two without, and the fifth with free service by the carrier. The Commission approved free service at

Thus, in various cases, carriers had, prior to action by the Commission, decided for themselves what spotting service at each plant was within the line-haul obligation, and as evidenced by refusal to pay allowances for industry performance, decided that some were not entitled to free carrier service. Principles established by the Commission, with approval of this Court, under *Ex Parte 104,* provide clear and understandable guides for such carrier determinations, which may be easily applied by their voluntary action. *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156. Here appellees refuse to apply those principles, contending that their custom of free service to all shippers, the competitive status of some shippers, and the claimed similarity of service as between plants warranted their non-action. They must know that their claimed practice of free spotting for all shippers, regardless of the nature, desires, or disabilities of a plant, differs from the practice of other carriers, and does not conform to the standard of simple and single movement, which this Court held the proper

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the one but held service at all four industry-served plants as not within the line-haul obligation, and canceled allowances paid at two. The situation at the United States Gypsum Company was considered under *Ex Parte 104* investigations, but under pending complaint as to allowances (220 I. C. C. 797), was disposed of, without supplemental report, when the New York Central voluntarily canceled allowances under its tariffs.

basis of determination. They still cling to the theory, as alleged in their complaint, that all industries, including the Staley Company, are entitled to free spotting, in spite of obstacles, incapacity, multiple movements, and standby service, so clearly shown to exist in the Staley service.

These carriers know that they may avoid penalty liability for such non-conformity, until the Commission may by order in each particular case force them to act. They here indicate further continued opposition to the principle that the Commission has authority to decide the beginning and ending of transportation. Their evasive persistence delays and hinders action of the Commission to equalize such charges. They know that if the order herein is finally held invalid that it will constitute an insurmountable obstacle to similar orders as to any or all of the claimed competing industries, because then the carriers could claim with equal force that such orders would result in a prohibited preference to the Staley Company.

It thus becomes apparent that the real objective of this action is not to assure equality of charges to competing industries, on the basis of applying to all the established terminal principles, which could be accomplished by voluntary carrier action, but rather to avoid such a charge as to all. It evidences continuance of the effort of these carriers to retain for themselves the right to decide, within their own discretion and without the Com-

mission's intervention, what is or is not a part of their transportation obligation. The benefit of this discretionary right would then be extended to the Staley Company as well as to other industries of these carriers' own selection. Their discretion could be exercised in complete disregard of principles established by the Commission and approved by this Court, to the effect that interferences, obstacles, and necessity to coordinate carrier and industry operations, would mark such a free service as a departure from the line-haul rates. See, *e. g., United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156. In such a manner, these carriers, and industries located on their lines, would obtain a competitive advantage over other carriers and other industries where, under final judicial decisions, similar free services have already ceased. The complaint herein makes it clear that this objective is not equality of treatment to industries on their lines but is a continuation, by indirect methods, of these carriers' efforts, previously presented by direct methods, to oppose the basic authority of the Commission to decide where transportation begins and ends. The complaint (R. 9) expresses the intention and belief of these carriers that services now performed at the Staley plant are not beyond their obligation under established rates. It is alleged (R. 6) that they reached the conclusion

that continued imposition of the Staley charge resulted in unreasonable rates. It is obvious from these allegations that these three carriers wish to decide what is or is not a part of their transportation obligation, without regard to "the evidence respecting the operations at [each] plant." *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 411. Such a basis differs from that upon which the Commission decided similar questions with judicial approval. These three carriers simply disagree with the Commission's conclusion in the instant case that the evidence of operations within that plant warrants the finding that the service is not carrier transportation. This Court in other cases (see cases cited, *supra*, p. 37) has said that such facts are sufficient to warrant such a decision. Thus, the Commission expected that the rail carriers would abide by principles plainly established and clearly stated in *Ex Parte 104*, 209 I. C. C. 11. This expectation has not been realized because some carriers, including the appellees, have refused to abide by the established principles. This is reflected in the excerpt from the Commission's 57th Annual Report to Congress, reproduced in the Appendix, *infra*, pp. 91–92.

Another way to avoid inequities claimed to result from the order, is one commonly used by those who believe they have been discriminated against. In many cases the Commission does not

know of existing inequities. Those who encounter inequities know of their existence and accordingly complain to the Commission. Here either the Staley Company, which claimed to have been discriminated against, or these three carriers who support that theory, might long ago have filed a complaint with the Commission, had they seen fit to do so, which would certainly have precipitated hearings and decisions. No such complaints were filed.

It is clear that the inequalities complained of could have been removed in three ways: (1) by the voluntary action of the carriers in filing their tariffs, (2) by complaint to the Commission filed by either the Staley Company or the appellees carriers, or (3) by action by the Commission on its own motion. The simplest method is, of course, the first; if unopposed, the tariffs could become effective within 30 days or, with the Commission's approval, in less time. Section 6 (1), (3) (49 U. S. C. 6 (1) (3)). Complaint by the Staley Company or the carriers would have required their submission of evidentiary support. The third method, action by the Commission upon its own motion, would relieve the Staley Company and carriers of preparing and submitting evidence in support of the issue, leave them free to oppose the Commission's efforts and place all the burden of investigation upon the Government.

The court below ignored the two simple alternatives to action by the Commission. The court

was shocked at the Commission's delay in taking action, but apparently was unconcerned over non-action of Staley, the party chiefly interested, and of the three carriers who claim such unwillingness to have one valued shipper subjected to such an inequality. It seems clear that non-action of these parties was designed to interpose every possible obstacle and delay to the Commission's efforts to apply principles, established with approval of this Court (*e. g., United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402) to terminal services generally.

If the court below had understood the real factors as stated above, it would have realized that the Commission has not planned to cause inequalities, preferences, or discriminations in respect to railroad operation. The court might have seen that here the Commission in dealing with widespread and long-continued rebates under the guise of terminal services, was faced with a particularly difficult task, the accomplishment of which involved delays and perhaps temporary inequalities. The court might have seen that for the time being the Staley Company was subject to a terminal charge because that case had been reached and decided, and as a result would not be treated exactly like its neighboring competitor, not yet covered by a decision. The court overlooks the possibility that such inequities, here com-

plained of, might have been removed by action of these carriers or by the Staley Company itself. It is difficult to see how anyone might, in the face of all these facts, find that the Commission has been arbitrary, simply because it has not yet decided the case of every Staley competitor with reference to the spotting services involved.

The many cases cited above, particularly *Union Stock Yards Co.* v. *United States,* 308 U. S. 213, 223–224, where failure to apply similar action to more than a hundred similar industries did not render the order invalid, provide an abundance of authority for the statement that as a matter of law, the Commission's failure to act as to Staley's competitors does not render the order as to that company invalid. To sustain the decree herein would truly prescribe impossible requirements precluding removal of rebates.

It seems inescapably correct, that if the 31 *Ex Parte 104* supplemental orders, already approved by the courts, are valid, that the supplemental order in the present case must be valid. It is difficult to see how approval of the Commission's order by this Court in *United States* v. *American Sheet and Tin Plate Co.,* 301 U. S. 402, and by a statutory district court in *Inland Steel Co.* v. *United States,* 23 F. Supp. 291 (N. D. Ill.), could fail, for the same reasons, to compel approval of the order herein. Both those cases and this one involved the

same carrier performance of the same kind of spotting service held by the Commission in each, on the same kind of evidence, not to be within the line-haul obligation.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed, the injunction ordered dissolved, and the petition dismissed.

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FEBRUARY 1944.

APPENDIX I

Interstate Commerce Act, February 4, 1887, c. 104, Part I, 24 Stat. 379, as amended.

Section 1 (3) (a) provides:

> The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier, operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property

transported. * * * (49 U. S. C. 1 (3) (a).)

Section 2 provides:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Section 3 (1) of the Act provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this

paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description. (49 U. S. C. 3 (1).)

Section 6 (1) provides:

That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in

two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part. (49 U. S. C. 6 (1).)

Section 6 (7) provides:

No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (49 U. S. C. 6 (7).)

Section 12 (1) provides:

The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the

business of all common carriers subject to the provisions of this part, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. (49 U. S. C. 12 (1).)

Section 13 provides in part:

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and

power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. * * * (49 U. S. C. 13 (1), (2).)

Section 15 provides in part:

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, reg-

ulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on

its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this part. (49 U. S. C. 15 (1), (13), (14).)

The Commission's 57th Annual Report to Congress (November 1, 1943), in discussing the Commission's attempt to correct problems of rebates given under the guise of terminal service, states (pp. 57, 58–59):

> After this decision of the Supreme Court, an effort was made to have the railroads canvass the situation at other plants where the industry was either performing the spotting service with its own power and receiving an allowance from the railroads, or where the latter were performing the spotting service under direction of the industry without charge in addition to the line-haul rate, with a view to bringing such practices into conformity with the principles announced by us and approved by the Supreme Court. We have met with no success in this effort. The carriers have failed voluntarily to apply these established principles, with the result that the practice of paying allowances or performing free switching services is not uniform in all parts of the country or even on the lines of single carriers.

The task of enforcing compliance with these understandable principles is of gigantic proportions, but seemingly one that must be met if uniform practice in respect to allowances and switching services and equality of treatment is to be provided for all shippers. We are investigating the situations at a number of plants.

Because of the time that has elapsed since the original hearing, conditions have changed at some of the plants; necessitating further hearings. In view of the reluctance of both the carriers and the industries voluntarily to give us all the facts upon which we can make a proper determination, we have found it necessary to conduct field investigations through our own employees. This is time consuming. In at least one case, where the industry was performing the spotting service with its own power and the allowance received therefor was condemned as unlawful, the industry disposed of its power and requested the respondents to perform the service. This the respondents did, making a charge against the industry for spotting services. We approved the imposition of the spotting charge. The case is now before the Supreme Court for decision. In attacking our order in the lower court, the industry contended that it was unjustly discriminatory and unduly prejudicial to require it to pay a spotting charge when its competitors receive such service from the carriers without charge. We are investigating all such alleged preferred services with a view to determining whether the service performed at such plants by the carriers is in excess of that which the carriers are obligated to perform under their line-haul rates.

APPENDIX II

CITATIONS OF EX PARTE 104, PART II AND SUPPLEMENTS THERETO

	Decided
Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses—Part II, Terminal Services.	May 14, 1935 209 I. C. C. 11
1st Sup. Rep.—Interlake Iron Corporation, Toledo, Ohio. Iron corporation.	May 14, 1935 209 I. C. C. 51
2d Sup. Rep.—Detroit Edison Company, Detroit, Mich. Power plant.	May 14, 1935 209 I. C. C. 55
3d Sup. Rep.—Universal Atlas Cement Company Steelton, Minn. Cement manufacturing plant.	May 14, 1935 209 I. C. C. 61
4th Sup. Rep.—Sheffield Steel Corporation, Kansas City, Mo. Steel plant.	May 14, 1935 209 I. C. C. 64
5th Sup. Rep.—Standard Oil Co. of Louisiana, North Baton Rouge, La. Oil refinery.	May 14, 1935 209 I. C. C. 68
Report on Rehearing in 5th Sup. Rep.	July 12, 1943 256 I. C. C. 5
6th Sup. Rep.—East Chicago Dock Terminal Co., East Chicago, Ind. Commercial dock.	May 14, 1935 209 I. C. C. 73
7th Sup. Rep.—Ford Motor Company, Detroit, Mich. Automobile manufacturer.	May 14, 1935 209 I. C. C. 77
8th Sup. Rep.—Keystone Steel & Wire Company, Peoria, Ill. Steel plant.	May 14, 1935 209 I. C. C. 82
9th Sup. Rep.—Pittsburgh Steel Company, Monessen, Pa. Steel plant.	May 14, 1935 209 I. C. C. 87
Report on Rehearing in 9th Sup. Rep.	Oct. 1, 1940 241 I. C. C. 562
10th Sup. Rep.—Magnolia Petroleum Company, Chaison, Tex. Refinery.	May 14, 1935 209 I. C. C. 93
11th Sup. Rep.—Allegheny Steel Company, Brackenridge, Pa. Steel and alloy products manufacturer.	June 7, 1935 209 I. C. C. 273
12th Sup. Rep.—Minnesota By-Products Coke Co., St. Paul, Minn. Coke-manufacturing company.	June 24, 1935 209 I. C. C. 421
13th Sup. Rep.—Humble Oil & Refining Company, Baytown, Tex. Oil refinery.	July 8, 1935 209 I. C. C. 727
14th Sup. Rep.—Timken Roller Bearing Company, Canton, Ohio. Steel products manufacturer.	June 24, 1935 209 I. C. C. 441
15th Sup. Rep.—Weirton Steel Company, Weirton, W. Va. Manufacturer of tin plate, sheet iron, strip steel, slabs, billets, sheet bars, and coke byproducts.	June 24, 1935 209 I. C. C. 445

16th Sup. Rep.—Mexican Petroleum Corporation of Louisiana, Inc., Destrehan, La. Refinery.	June 25, 1935 209 I. C. C. 394
17th Sup. Rep.—Pittsburgh Plate Glass Company, Pittsburgh, Pa. Industrial plant.	June 25, 1943 209 I. C. C. 467
18th Sup. Rep.—American Sheet & Tin Plate Company, Vandergrift and Scottdale, Pa., and Wellsville, Ohio. Steel manufacturer and tin plate company.	July 5, 1935 209 I. C. C. 719
19th Sup. Rep.—Inland Steel Company, Indiana Harbor, Ind. Producer of iron and steel articles and coke by-products.	July 11, 1935 209 I. C. C. 747
20th Sup. Rep.—Wickwire-Spencer Steel Company, Harriet, N. Y. Manufacturer of pig iron, wire, wire rods, wire fence, wire mesh, and wire nails.	July 11, 1935 209 I. C. C. 751
21st Sup. Rep.—Gulf Refining Company, Port Arthur, Tex.	July 11, 1935 209 I. C. C. 756
22d Sup. Rep.—Granite City Steel Company, Granite City and Madison, Ill. Steel-manufacturing plant.	July 11, 1935 209 I. C. C. 761
23d Sup. Rep.—Celotex Company, Marrero, La. Celotex board manufacturer.	July 11, 1935 209 I. C. C. 764
Report on Rehearing in 23d Sup. Rep	Apr. 17, 1941 245 I. C. C. 105
24th Sup. Rep.—Texas Company, Houston, Tex. Refinery.	July 11, 1935 209 I. C. C. 767
25th Sup. Rep.—Western Paving Company, Dougherty, Okla. Paving Company.	July 11, 1935 209 I. C. C. 770
26th Sup. Rep.—Detroit Harbor Terminals, Inc., Detroit, Mich. Warehouse and dock.	July 13, 1935 209 I. C. C. 787
27th Sup. Rep.—Great Southern Lumber Company-Bogalusa Paper Company, Bogalusa, La. Logging and lumber business and paper company.	July 12, 1935 209 I. C. C. 793
28th Sup. Rep.—St. Louis Gas & Coke Corporation, Granite City, Ill. Coke and coke by-products producer.	July 12, 1935 209 I. C. C. 797
29th Sup. Rep.—Kansas City Power & Light Company, Kansas City, Mo. Electric power plant.	July 19, 1935 210 I. C. C. 103
30th Sup. Rep.—Great Lakes Steel Corporation, Ecorse (Detroit), Mich. Steel plant.	July 12, 1935 210 I. C. C. 9
31st Sup. Rep.—Iron Ore Mining Companies Stock Pile, Mesabi Iron Range district of Minnesota. Iron ore mining company.	Aug. 12, 1935 210 I. C. C. 254
32d Sup. Rep.—Studebaker Corporation, South Bend, Ind. Automobile manufacturing plant.	July 19, 1935 210 I. C. C. 137
33d Sup. Rep.—Interlake Iron Corporation, Duluth, Minn. Engaged in production of pig iron, coke, coke oven by products, and selling of coal.	July 29, 1935 210 I. C. C. 205

34th Sup. Rep.—Crane Company, Chicago, Ill. Manufacturer of plumbing and steam-fitting supplies, pipe, and valves.	July 29, 1935 210 I. C. C. 210
35th Sup. Rep.—West Leechburg Steel Company, Leechburg, Pa. Producer of cold-rolled strip and skelp steel.	July 29, 1935 210 I. C. C. 213
36th Sup. Rep.—Alabama By-Products Corporation, Tarrant (N. Birmingham), Ala. Producer of coke, benzol, acids, tar, and other coal byproducts.	Sept. 25, 1935 210 I. C. C. 644
37th Sup. Rep.—Petoskey Portland Cement Company, Petoskey, Mich. Cement manufacturing plant.	Aug. 6, 1935 210 I. C. C. 242
38th Sup. Rep.—Louisville Cement Company, Speeds, Ind. Manufacturer of cement.	Aug. 12, 1935 210 I. C. C. 293
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39th Sup. Rep.—Standard Steel Car Company, Hammond, Ind. Manufacturer of railway equipment and cars.	Aug. 12, 1935 210 I. C. C. 296
40th Sup. Rep.—General American Tank Car Corp., East Chicago, Ind. Engaged in building repairing, and leasing freight cars of various types, including tank and refrigerator cars.	Aug 14, 1935 210 I. C. C. 383
41st Sup. Rep.—Pacolet Manufacturing Company, Pacolet, S. C. Operates a cotton mill.	Aug. 23, 1935 210 I. C. C. 475
42d Sup. Rep.—Marion Steam Shovel Company, Marion, Ohio. Power-shovel and machinery manufacturing plant.	Sept. 28, 1935 210 I. C. C. 655
43d Sup. Rep.—Pittsburgh Plate Glass Company, Crystal City, Mo. Plate glass manufacturer.	Sept. 12, 1935 210 I. C. C. 527
44th Sup. Rep.—Texas Company, Port Arthur, Tex. Engaged in refining, manufacture, and sale of petroleum and its products.	Jan. 15, 1936 213 I. C. C. 583
45th Sup. Rep.—Goodman Lumber Company, Goodman, Wis. Lumber and chemical company.	Feb. 8, 1936 214 I. C. C. 89
46th Sup. Rep.—Wheeling Steel Corporation, Steubenville, Ohio, East Steubenville, W. Va., Benwood, W. Va., and Martins Ferry, Ohio. Industrial plants.	Feb. 3, 1936 214 I. C. C. 53
47th Sup. Rep.—Uvalde Rock Asphalt Company, Cline, Tex. Quarries, crushes, and ships phosphoric stone.	Aug. 24, 1936 218 I. C. C. 271
48th Sup. Rep.—John Morrell & Company, Ottumwa, Iowa. Meat-packing plant.	May 8, 1936 215 I. C. C. 431
49th Sup. Rep.—Commonwealth Edison Company, Chicago, Ill. Electric generating stations.	Apr. 1, 1936 215 I. C. C. 173

50th Sup. Rep.—William Wharton, Jr., & Co., Inc., Easton, Pa. Steel company.	May 19, 1936 215 I. C. C. 623
51st Sup. Rep.—Midvale Company, Nicetown, Pa. Manufactures and sells steel products.	May 19, 1936 215 I. C. C. 626
52d Sup. Rep.—Acme Steel Company, Riverdale, Ill. Manufacturer of strip steel.	Apr. 28, 1936 215 I. C. C. 373
53d Sup. Rep.—A. O. Smith Corporation, Milwaukee, Wis. Manufacturer of automobile frames, gear frames, and axle housing for automobile industry, heavy pipe and pipe couplings, petroleum cracking and distilling vessels for oil industry.	May 19, 1936 215 I. C. C. 534
54th Sup. Rep.—Warren Foundry & Pipe Corporation, Phillipsburg, N. J. Manufacturer of cast-iron pipe fittings and special fittings.	May 21, 1936 215 I. C. C. 653
55th Sup. Rep.—A. E. Staley Manufacturing Company, Decatur, Ill. Grain products manufacturer.	May 22, 1936 215 I. C. C. 656
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56th Sup. Rep.—Chicago By-Product Coke Company, Chicago, Ill. Producer of gas, coke, and coke by-products such as sulphate of ammonia and tar.	May 28, 1936 216 I. C. C. 8
57th Sup. Rep.—American Steel Foundries, Indiana Harbor, Ind. Manufacturer of steel castings and railroad specialties.	May 28, 1936 216 I. C. C. 13
58th Sup. Rep.—Louisiana Development Company, Winnfield, La. Conducts a rock-salt mining operation.	Aug. 24, 1936 218 I. C. C. 276
59th Sup. Rep.—Red River Lumber Company, Westwood, Calif. Lumber company.	July 26, 1939 234 I. C. C. 287
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60th Sup. Rep.—J. Neils Lumber Company, Libby, Mont. Lumber mill.	May 27, 1940 238 I. C. C. 543
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61st Sup. Rep.—Medford Corporation, Medford, Oreg. Conducts lumbering and mill-work operations and ships finished and rough materials.	Sept. 4, 1940 241 I. C. C. 407
62d Sup. Rep.—Chiloquin Lumber Company, Chiloquin, Oreg. Lumber company.	Sept. 28, 1940 241 I. C. C. 495
Report on rehearing in 62d Sup. Rep	Apr. 17, 1941 245 I. C. C. 112
63d Sup. Rep.—Lamm Lumber Company, Modoc Point, Oreg. Lumber mill and box factory.	May 27, 1941 245 I. C. C. 575

64th Sup. Rep.—Silver Falls Timber Company, Silverton, Oreg. Powerhouse, sawmill, planing mill, sheds for storage of lumber, yard for storage of rough lumber, and log pond, and auxiliary facilities.	May 27, 1941	245 I. C. C. 509
65th Sup. Rep.—Inland Empire Paper Company, Millwood, Wash. Paper manufacturer.	July 9, 1941	246 I. C. C. 127
66th Sup. Rep.—Republic Steel Corporation, Buffalo, N. Y. Steel company.	Nov. 7, 1942	253 I. C. C. 595
67th Sup. Rep.—Hanna Furnace Corporation, Buffalo, N. Y. Producer and shipper of pig iron and occasional loads of other freight, including machinery.	Nov. 11, 1942	253 I. C. C. 613
68th Sup. Rep.—Tonawanda Iron Corporation, North Tonawanda, N. Y. Manufacturer of pig iron.	Feb. 13, 1943	255 I. C. C. 231
69th Sup. Rep.—Kingan & Company, Indianapolis, Ind. Packing company (meat).	June 2, 1943	255 I. C. C. 531
Sup. Rep.—American Bridge Company, Ambridge and Pencoyd, Pa., Trenton, N. J., Elmira Heights, N. Y., and Toledo, Ohio. Engaged in fabrication of steel.	Sept. 11, 1943	Unreported
Sup. Rep.—Sharon Steel Hoop Company, Sharon, Pa. Operates steel mills.	Sept. 11, 1943	Unreported
Sup. Rep.—Wickwire Brothers, Inc., Cortland, N. Y. Manufacturing of wire nails, rods, fencing, wire screen cloth, blooms, bars, etc.	Sept. 11, 1943	Unreported
Sup. Rep.—McClintic-Marshall Corporation, Leetsdale, Pa. Manufacturer of stand pipes, blast furnaces, gas holders, barges, transmission towers, etc.	Sept. 11, 1943	Unreported
Sup. Rep.—Worth Steel Company, Claymont, Del. Manufacturer of steel plates, blue annealed sheets, flange and dished heads and nozzles.	Sept. 11, 1943	Unreported

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